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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES M.,

Defendant and Appellant.

2d Crim. No. B291469
(Super. Ct. No. 18PT-00207)
(San Luis Obispo County)

Charles M. appeals an order committing him to the Department of Mental Health for treatment as a mentally disordered offender (MDO) after a court trial. (Pen. Code, § 2960 et seq.)¹ Appellant suffers from pedophilic disorder and received cognitive behavioral treatment at Corcoran State Prison before he was transferred to Atascadero State Hospital and certified as an MDO. Appellant contends the treatment does not meet the statutory requirement that he receive 90 days or more treatment

¹ All statutory references are to the Penal Code.

for his severe mental disorder in the year preceding his parole or release date. (§ 2962, subd. (c).) We affirm.

Procedural History

Appellant was sentenced to state prison following his conviction in 2015 for committing lewd acts on his prepubescent stepdaughter. (§ 288, subd. (a).) On November 9, 2017, appellant was transferred to Atascadero State Hospital (ASH) and on January 31, 2018, the Board of Parole Hearings (BPH) certified appellant as an MDO. Appellant challenged the BPH determination in superior court and waived jury trial.

Doctor Roxanne Rassti, a forensic psychologist at ASH, opined that appellant suffered from Pedophilic Disorder, nonexclusive type, limited to incest. The severe mental disorder was not in remission and could not be kept in remission without treatment. When Dr. Rassti interviewed appellant, appellant denied engaging in inappropriate behavior, denied the facts of the commitment offense and a prior 1991 conviction for incest with a 10-year-old half brother, blamed the victims, and denied that he needed treatment. Dr. Rassti opined that appellant posed a risk of substantial harm to others because he had little insight into his diagnosis, behavior, what triggers his behavior, or his need for treatment.

Appellant claimed that his treatment in the Cognitive Behavioral Intervention for Sex Offenders program (CBI-SO) at Corcoran State Prison did not satisfy criteria five of MDO statute² which requires that “[t]he prisoner has been in

² In order to qualify an MDO for commitment, the prisoner must meet six statutory criteria. (§ 2962, subds. (a)–(d)(1).) The six criteria are that the prisoner: (1) has a severe mental disorder; (2) used force or violence in committing the underlying

treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner's parole or release." (§ 2962, subd. (c).) The Corcoran CBI-SO is a cognitive behavior intervention program for sex offenders, run by clinical social workers through the California Department of Corrections and Rehabilitation. Brandon Mason, the CBI-SO supervising psychiatric social worker, stated it is an eight-month program and offered to a variety of sex offenders ranging from exhibitionists to human traffickers to pedophiles. Every sex offender in the program receives the same group-based treatment and a central component of the treatment is to find the sex offender's "triggers." The program helps the sex offender identify the triggers for his or her offense and develop coping skills to reduce those triggers and the likelihood of recidivism. Mason said that the Corcoran CBI-SO program is a pilot program and operates separate and apart from the prison mental health program. Sex offenders are screened for the CBI-SO program, which is limited to 80 prisoners.

ASH also has a CBI-SO program, which provided appellant cognitive behavior therapy following his transfer from Corcoran. Doctor Cindy Mitchell, the sexual offender services coordinator at ASH, stated that the ASH program is similar to

offense; (3) had a mental disorder that caused or was an aggravating factor in the commission of the underlying offense; (4) the disorder is not in remission or capable of being kept in remission without treatment; (5) the prisoner was treated for the disorder for at least 90 days in the year prior to his parole or release; and (6) the prisoner poses a serious danger of physical harm to others by reason of the disorder. (§ 2962, subd. (d)(1); *People v. Clark* (2000) 82 Cal.App.4th 1072, 1075–1076.)

the Corcoran CBI-SO program and uses cognitive behavior treatment and self-regulation therapy. Although the ASH program is longer (18 months) and includes other program modules, it is consistent with the cognitive behavior treatment at Corcoran.

Appellant argued that the Corcoran CBI-SO program was an experimental program run by the California Department of Corrections and Rehabilitation (§ 5058.1) and did not satisfy the MDO 90-day treatment criteria because the program is administered by clinical social workers rather than psychiatrists or psychologists. Rejecting the argument, the trial court found that it was possible that the Corcoran CBI-SO program “is not nearly as good as the one in ASH. I would expect as much. But I don’t find that the [MDO statute] requires that a psychologist or a psychiatrist [administer the treatment].” The trial court found that appellant “was offered treatment, it wasn’t specific to pedophilia, but it was specific to sex offenders. . . . [T]he purpose of that treatment was to reduce recidivism in sex offenders. They [i.e. Corcoran] don’t offer medications, but neither does the state hospital. . . . [¶] [¶] . . . Dr. Mitchell did testify that their – that the program [at ASH] was substantially similar.”

90 Days of Treatment

Appellant asserts that the evidence is insufficient to support the finding that he received 90 days or more of treatment within the meaning of section 2962, subdivision (c). The argument is based on the theory that cognitive behavior therapy at Corcoran is not mental health treatment because it is not administered by psychiatrists or psychologists. Dr. Mitchell explained that cognitive behavior therapy is the prescribed treatment for pedophilia, which is what appellant received at

Corcoran. Nothing in the MDO statute specifically requires that the treatment be administered by a psychiatrist or psychologist before the prisoner is transferred to ASH.

Appellant contends that the Corcoran CBI-SO program does not qualify as treatment unless it is directed by the State Department of Mental Health (DMH), as is the case for parole outpatient treatment programs. (See § 2964, subd. (a).) Citing *People v. Del Valle* (2002) 100 Cal.App.4th 88 (*Del Valle*) and *People v. Achrem* (2013) 213 Cal.App.4th 153 (*Achrem*), appellant argues that sections 2962 and 2964, when combined, require that the Corcoran CBI-SO treatment be planned, approved and implemented by the DMH. There is no such requirement in section 2962. Section 2924 is inapposite and governs the outpatient treatment of parolees.

In *De Valle, supra*, 100 Cal.App.4th 88, defendant received five days of outpatient treatment at a community clinic before his incarceration and 85 days of treatment in prison. (*Id.* at pp. 91-92.) We held that private treatment before defendant's incarceration did not fulfill the 90-day treatment requirement. (*Id.* at p. 93.) The reason was straightforward. Outpatient treatment does not count if it is in a private clinic and occurs before the defendant starts serving his or her prison sentence. Section 2962, subdivision (d)(1) requires that "the *prisoner* has been in treatment for the severe mental disorder for 90 days or more within the year prior to his or her parole release day" (*Italics added.*)

In *Achrem, supra*, 213 Cal.App.4th 153, the prisoner received treatment at a DMH approved parole outpatient clinic. (See § 2964, subd. (a).) We held that it satisfied the 90-day treatment criterion as provided in section 2962, subdivision (c)

and section 2964, subdivision (a). (*Achrem, supra*, at p. 155.) The term “prisoner,” as set forth in the MDO statute, included out-of-custody parolees who receive DMH approved outpatient treatment. (*Id.* at p. 157.) Unlike *Achrem*, appellant received treatment at Corcoran while in custody. Appellant argues that the treatment must be directed by DMH and administered by psychiatrists or psychologists, but that is only required for parolee outpatient treatment. (See § 2964, subd. (a).)

*People v. Sheek: Treatment for a Different,
Nonqualifying Mental Disorder*

Relying on *People v. Sheek* (2004) 122 Cal.App.4th 1606 (*Sheek*), appellant argues that “the letter [and] spirit of [section 2962]” require that the prisoner be treated for his or her diagnosed severe mental disorder. (*Id.* at p. 1611.) In *Sheek*, defendant was treated for depression before he was diagnosed and treated for pedophilia, the qualifying mental disorder. (*Id.* at p. 1609.) The Court of Appeal held that “defendant was not treated *for that disorder*” until it was diagnosed and the People could not “bootstrap the treatment defendant received for his depressive disorder, which was indisputably in remission” (*Id.* at p. 1611.)

People v. Bendovid (2018) 30 Cal.App.5th 585 is a *Sheek* case where defendant was diagnosed and treated in jail for nonqualifying disorders (mood and borderline personality disorders) before he was diagnosed and treated in prison for the severe mental disorder (delusional disorder). (*Id.* at pp. 588-589.) Citing *Sheek*, we held that the People could not bootstrap the treatment for mood and borderline personality disorder in place of treatment for the delusional disorder. (*Id.* at p. 595.) “The People must prove Bendovid was treated for *the* severe mental

disorder that subjects him to the MDO commitment. [Citation.] Proof that he was treated for other mental disorders is not sufficient. [Citation.] The statute is mandatory. ‘Section 2962, subdivision (c) specifically refers to treatment of “the” mental disorder, not “a” mental disorder.’ [Citation.] . . . [¶] . . . ‘Given that the People failed to offer any proof that defendant’s [delusional disorder] was diagnosed before [May 20, 2017], it necessarily follows that defendant was not treated *for that disorder*’ in jail. [Citation.]” (*Ibid.*)

Unlike *Bendavid*, there is no failure of proof concerning the cognitive behavior treatment appellant received at Corcoran. The treatment was substantially the same as the treatment at ASH. Appellant complains that he was not diagnosed as suffering from pedophilia while at Corcoran but that is of no consequence. Appellant was serving a prison sentence for lewd conduct on a minor under the age of 14 and had a prior incest conviction involving a 10-year-old half brother. Dr. Rassti testified that no mental disorder other than pedophilia could be associated with the conviction. Although the Corcoran CBI-OS program was open to a wide variety of sex offenders, that does not detract from the fact that appellant received essentially the same treatment at Corcoran and ASH for the same disorder. Dr. Mitchell stated the ASH treatment was substantially the same and described it as “[s]ex offender treatment. We use cognitive behavior therapy [and] self-regulating therapy”

Appellant argues that prison regulations require that all mental health treatment and diagnostic services at Corcoran be provided by a psychiatrist or psychologist who holds a doctorate degree. (Cal. Code Regs., tit. 15, § 3361.) Those regulations were promulgated pursuant to section 5058,

subdivision (a), which excludes “those persons who meet the criteria . . . in Section 2962” of the MDO Act. There is nothing in the MDO Act that requires that in-custody prisoners be provided 90 days of DMH directed treatment or that the treatment be administered by psychiatrists or psychologists. Citing *Sheek* appellant argues that “the letter and the spirit” of section 2962 require that the prisoner receive 90 days of treatment for the same severe mental disorder on which the prisoner is certified as an MDO. (*Sheek, supra*, 122 Cal.App.4th at p. 1611.) But appellant did receive the prescribed treatment, i.e., cognitive behavior therapy.

Appellant argues that under *Bendavid*, there is no qualifying treatment until the severe mental disorder is first diagnosed. Section 2962, however, does not say when the severe mental disorder has to be diagnosed. Instead it provides that the prisoner must have “been in treatment for the severe mental disorder for 90 days or more” (§ 2962, subd. (c).) Appellant received most of the CBS-IO treatment at Corcoran but the pedophilic disorder was not diagnosed until he was transferred to ASH. Dr. Mitchell testified that the Corcoran CBI-SO program was consistent with ASH’s cognitive behavior therapy program.

Appellant asserts that ASH patients suffering from pedophilic disorder can be prescribed medication to reduce sexual desire. Dr. Mitchell stated there are no known medications to treat pedophilic disorder and “[w]e use cognitive behavior therapy [and] self-regulation therapy” “Our programming is a little bit longer and we include other aspects, other programs, but it is consistent with cognitive behavioral treatment for sex offenders.”

Appellant finally argues that the 90-day treatment criteria was not met because MDO patients at ASH do not receive treatment credit for Corcoran CBI-OS treatment. Dr. Mitchell stated there are no treatment credits because ASH has nothing in writing “that says whether or not this person was actually working their treatment program or whether they were manipulating or just showing up to the treatment program. So I have to basically start them from scratch . . . based on . . . an assessment of them when they first come in to see . . . what their needs are.” ASH’s “treatment program is, at basic level, designed to be an 18-month treatment program It is based on whether or not they make change as assessed by our psychologist and therapists in the program.”

Conclusion

As discussed in *Achrem*, “we take the MDO [statute] as we find it. [Citation.]” (*Achrem*, *supra*, 213 Cal.App.4th at p. 159.) Appellant cites no statutory authority that a pedophilic disorder must first be diagnosed before treatment will be recognized under the MDO Act. In the case of pedophilic disorder, the diagnosis can be a difficult call because there are so many distinct paraphilic disorders.³ That explains why cognitive behavior treatment is used at ASH. Dr. Mitchell said “there is no specific treatment designed for pedophilic disorder. We treat

³ The American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) DSM-5, page 685, lists eight paraphilic disorders but states the “listed disorders do not exhaust the list of possible paraphilic disorders. Many dozens of distinct paraphilias have been identified and named, and almost any of them could, by virtue of its negative consequences for the individual or for others, rise to the level of a paraphilic disorder.”

behaviors, sex offending behaviors. . . . [W]e don't address their specific diagnosis per se." Based on appellant's construction of the MDO law, the 90-day treatment criterion is never met until the specific paraphilia disorder (and there are dozens of distinct paraphilias) is first diagnosed. That is not the law.

The trial court found that the treatment of pedophilic disorders "is different" but "it does appear to be captured by the MDO law." "I don't find any trouble meeting the [90-day treatment] criterion frankly." It found that Brandon Mason's testimony (the supervising psychiatric clinical social worker at Corcoran) was "compelling" and credited Dr. Mitchell's testimony that the Corcoran CBI-SO program is substantially similar to the ASH program for pedophilic disorder. Because this is a substantial evidence appeal, we are precluded from reweighing the evidence or substituting our judgment for the trial court. (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1083; *People v. Bowers* (2006) 145 Cal.App.4th 870, 879 [single mental health expert opinion constitutes substantial evidence].)

The judgment (MDO commitment order) is affirmed.

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YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Jesse J. Marino, Judge

Superior Court County of San Luis Obispo

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